

(18)  
No. 93-908

FILED

MAY 24 1994

OFFICE OF THE CLERK

**In the  
Supreme Court of the United States**  
October Term, 1994

**CHARLES J. REICH,**  
*Petitioner,*

v.

**MARCUS E. COLLINS, et al.,**  
*Respondent.*

**On Writ of Certiorari To The  
Supreme Court of Georgia**

**BRIEF AMICUS CURIAE OF THE  
STATE OF NORTH CAROLINA  
IN SUPPORT OF RESPONDENT**

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#### INTEREST OF AMICUS CURIAE

North Carolina has direct interests in the outcome of this case and, pursuant to Supreme Court Rule 37, submits this brief in support of Georgia. After this Court decided *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) ("*Davis*"), federal pensioners sued North Carolina to recover refunds of income taxes paid on their federal pension income for tax years prior to *Davis*. The amount of the refunds claimed was in excess of \$140,000,000, exclusive of interest. North Carolina defended against the claims on two

grounds: (1) that *Davis* should be applied prospectively only; and (2) that the federal pensioners' claims were barred by their failure to comply with North Carolina's refund statute, N.C. Gen. Stat. § 105-267, which limits refunds to those taxpayers who protest within 30 days after paying a contested tax. In its first opinion, the Supreme Court of North Carolina held that *Davis* applied prospectively only. *Swanson v. North Carolina* ("Swanson I"), 329 N.C. 576, 407 S.E.2d 791, *adhered to on rehearing*, 330 N.C. 390, 410 S.E.2d 490 (1991) ("Swanson II"). This Court granted certiorari, reversed the *Swanson* decisions, and remanded for reconsideration in light of *Harper v. Virginia Department of Taxation*, 125 L. Ed. 2d 74 (1993) ("*Harper*"). *Swanson v. North Carolina*, 125 L. Ed. 2d 713 (1993). On March 4, 1994, the Supreme Court of North Carolina held that N.C. Gen. Stat. § 105-267 met the due process requirements enunciated in *McKesson v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) and *Harper* and dismissed the refund claims of the federal pensioners for failure to comply with N.C. Gen. Stat. § 105-267's procedural requirements. *Swanson v. North Carolina* ("Swanson III"), 335 N.C. 674, 441 S.E.2d 537 (1994). North Carolina is informed that federal pensioners will petition this Court for a writ of *certiorari* to review *Swanson III* in the near future.

North Carolina recognizes that the *Reich* case involves predeprivation rather than postdeprivation remedies for *Davis* claims but is concerned that federal pensioners' arguments blur the distinctions between the two. This is not an idle concern. The *Reich* petitioners argue that the alleged inadequacy of Georgia's predeprivation remedy entitles them

to refunds, and federal pensioners in *Swanson*, relying on *Harper*, argued that the absence of any predeprivation remedy in North Carolina automatically entitled them to refunds. Unless the Court declares that the states may continue to provide either predeprivation or postdeprivation remedies to taxpayers and reiterates the constitutional principles concerning postdeprivation remedies enunciated in *McKesson*, the Court risks creation of needless uncertainty concerning tax collection in states like North Carolina that rely on postdeprivation procedures which include procedural requirements such as timely payment under protest and relatively short statutes of limitations. Thus, as *amicus curiae*, North Carolina has a compelling interest in the outcome of this case.

### SUMMARY OF ARGUMENT

North Carolina urges the Court to make clear that its analysis and holding in *Reich* do not affect the settled law relating to postdeprivation remedies set forth in *McKesson*. It is vital to North Carolina and other states that the decision in *Reich* not circumscribe the postdeprivation procedures on which they rely to protect their fiscal stability, as authorized by *McKesson* and summarized in *dicta* in *Harper*. North Carolina also urges the Court to restate unequivocally its holding in *McKesson* that states may constitutionally limit their refund liability, and thereby preserve public funds intended to benefit all their citizens; by imposing procedural conditions on recovery of refunds, e.g., by making "refunds . . . available only to those taxpayers paying under protest or



providing some other timely notice of complaint." *McKesson*, 496 U.S. at 45.

### ARGUMENT

**THIS COURT SHOULD MAKE CLEAR THAT ITS DECISION IN *REICH* DOES NOT DISTURB WELL SETTLED LAW THAT STATES MAY CONSTITUTIONALLY EMPLOY POST-DEPRIVATION REMEDIES THAT INCLUDE PROCEDURAL REQUIREMENTS THAT MUST BE MET TO OBTAIN REFUNDS, INCLUDING TIMELY PAYMENT UNDER PROTEST REQUIREMENTS.**

Petitioners argue that Georgia's predeprivation procedures are inadequate and that they are entitled to refunds for that reason. In *Swanson*, federal pensioners contended that the remedies discussion in Part III of *Harper* modified the clearly established postdeprivation law enunciated in *McKesson* such that refunds are now automatically required in the absence of an adequate predeprivation remedy -- in effect overruling a key portion of *McKesson sub silentio*. The *Swanson* federal pensioners reasoned that because North Carolina has no predeprivation remedies at all this Court's *dicta* in Part III of *Harper* automatically entitled them to refunds. This Court should take the opportunity presented in *Reich* to dispel such erroneous notions. The federal pensioners' arguments fly in the face of this Court's unanimous decision in *McKesson* that states may constitutionally use postdeprivation procedures in tax collection and, further, that states may constitutionally protect their financial

security by limiting their liability for refunds of taxes collected pursuant to a statute later held unconstitutional to those citizens who comply with procedural requirements, such as timely payment under protest.

*McKesson* and *Harper* were decided against the backdrop of a long line of cases holding that the specific requirements of the Due Process Clause are based on a balancing of the respective interests of affected citizens and the government. See, e.g., *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Court has long recognized that hearings are not required prior to government deprivations where a prior hearing would be inconsistent with a countervailing state interest of overriding significance. See, e.g., *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931); *Dodge v. Osborn*, 240 U.S. 118 (1916); see also, Lawrence H. Tribe, *American Constitutional Law*, § 10-14 at 720-21 (2d ed., 1988). Tax collection is such an area. In *McKesson*, this Court noted that "it is well established that a State need not provide predeprivation process for the exaction of taxes" and that postdeprivation procedures may be used "to protect government's exceedingly strong interest in financial stability" in the collection of tax. *McKesson*, 496 U.S. at 36-37.

In *Harper*, the Court relied exclusively on *McKesson*, and in *McKesson* the Court reaffirmed that the Due Process Clause does *not* require a predeprivation remedy for unconstitutional taxation and that states may fully satisfy their due process obligations to taxpayers by providing "a meaningful opportunity to secure postpayment relief for taxes already

paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson*, 496 U.S. at 22. (Emphasis added). Balancing the interests of taxpayers and the government, the Court held that states may limit taxpayers to postpayment remedies because "[a]llowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *McKesson*, 496 U.S. at 36-37. The Court again emphasized the states' fiscal needs in discussing their ability to fashion postdeprivation remedies incorporating procedural conditions designed to limit their refund liability. The Court reiterated that "States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available only to those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions . . . Such procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation." *McKesson*, 496 U.S. at 50. This Court's holding in *McKesson* is clear and unambiguous: statutory preconditions to obtaining refunds, such as payment under protest provisions, do not deny due process and are constitutional. The clarity of this settled law should not be obscured by federal pensioners' assertions that lack of adequate predeprivation remedies somehow automatically entitles them to refunds.

North Carolina's refund statute, N.C. Gen. Stat. § 105-267, incorporates some of the very procedural safeguards this Court expressly identified in *McKesson*, e.g., a timely payment under protest provision and relatively short statute of limitations, that states may constitutionally use to protect their financial stability so funds will be available to provide vital public services for their citizens. N.C. Gen. Stat. § 105-267 provides that to obtain a refund of a tax whose constitutionality is challenged a taxpayer must pay the tax and protest its legality by demanding a refund within 30 days of payment. The taxpayer then has three years within which to bring suit if the Secretary of Revenue denies his or her request or takes no action within 90 days of the demand. After *Davis*, some 12,000 federal pensioners met the timely payment under protest requirement of N.C. Gen. Stat. § 105-267 and received refunds in excess of \$9,000,000; those who failed to comply were denied refunds. *Swanson III*, 335 N.C. at 682 n. 1, 441 S.E.2d at 542.

N.C. Gen. Stat. § 105-267 and its predecessor statutes have been in place for over 100 years. The Supreme Court of North Carolina has held that it is the exclusive method by which a taxpayer can challenge the constitutionality of a State tax statute and obtain a refund of taxes paid under that statute. *Swanson III*, 335 N.C. at 680, 441 S.E.2d at 541. (Applying *Harper* and *McKesson* to federal pensioners' *Davis* refund claims); *Bailey v. North Carolina*, 330 N.C. 227, 235, 412 S.E.2d 295, 300 (1991), *cert. denied*, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992) (Applying N.C. Gen. Stat. § 105-267 to deny claims of State pensioners that taxation of their retirement benefits pursuant



to a statute equalizing the tax treatment of State and federal pension income following *Davis* violated their constitutional rights). See also, *Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977) (N.C. Gen. Stat. § 105-267 held to be the exclusive method to challenge the constitutionality of a State tax statute and failure to meet its requirements bars refund claim); *Kirkpatrick v. Currie*, 250 N.C. 213, 108 S.E.2d 209 (1959) (N.C. Gen. Stat. § 105-267 accords taxpayer due process of law and is constitutional); *Richmond & Danville R.R. Co. v. Reidsville*, 109 N.C. 494, 13 S.E. 865 (1891) (Failure to demand refund of tax within 30 days of payment pursuant to predecessor statute to N.C. Gen. Stat. § 105-267 bars claim for refund of tax collected pursuant to an allegedly unconstitutional statute).

It is extremely important that the Court make clear in *Reich*, as it did in *McKesson*, that states retain the flexibility to adopt postdeprivation remedies such as N.C. Gen. Stat. § 105-267. This flexibility is essential to the states' ability to provide public services to all citizens without fear of devastating and unpredictable revenue shortfalls occasioned by the refund of taxes collected in good faith reliance on presumptively valid state tax statutes. The public good will not be served if through inadvertence or lack of clarity the states' ability to meet the needs of all citizens is undermined or circumscribed in the Court's decision in *Reich*.

### CONCLUSION

North Carolina urges the Court to make clear that its decision in *Reich* does not affect the settled law relating to

postdeprivation remedies set forth in *McKesson*. North Carolina further requests the Court to reiterate its prior holdings that states may constitutionally use postdeprivation as well as predeprivation procedures in collection of taxes and that postdeprivation remedies may include procedural conditions such as timely payment under protest and relatively short statutes of limitation.

Respectfully submitted, this the 24th day of May, 1994.

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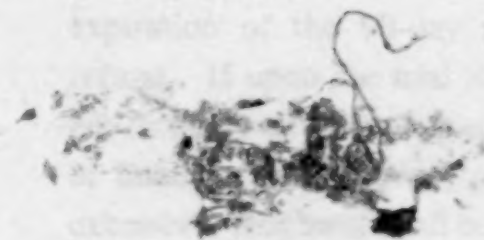


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## APPENDIX

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N.C. Gen. Stat. § 105-267 . . . . . 1a



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**§ 105-267. Taxes to be paid; suits for recovery of taxes.**

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2. (1939, c. 158, s. 936; 1955, c. 1350, s. 15; 1957, c. 1340, s. 10; 1977, c. 946, s. 1.)